88-1072

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF TENNESSEE, HAWKINS COUNTY, TENNESSEE, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether Tennessee may impose a tax on a private contractor's beneficial use of federal property and measure that tax by the value of the federal property, minus a deduction for any restricted use, in an effort to equalize taxation of federal contractors with that of owners and other users of property in the State, without violating the supremacy clause of the United States Constitution?

LIST OF PARTIES

The parties to the proceedings below were (1) the State of Tennessee, (2) Hawkins County, Tennessee, (3) Dan Brooks, Hawkins County Executive, (4) Jerry Stewart, Hawkins County Trustee, (5) Grady Marshall, Hawkins County Property Assessor, (6) Donald Anderson, Carl K. Bailey, R. Wayne Crater, Hanes Cooper, Margaret Cooper, Virginia C. Dalton, Ina Danko, Frankie R. Davis, Wilburn K. Dean, Howard Elkins, Carl D. Frazier, Boyd Goodson, Albert B. Horn, D.L. Johnson, Kenneth H. Long, Claude K. Parrott, Jean J. Price, L.M. Sharp, R. Frank Testerman, Charles K. Thacker, Wayne Wagner, County Commissioners of Hawkins County and (7) the United States of America. All of these parties are petitioners to this Court, except for the United States which is the respondent.

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IN THE

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No.

STATE OF TENNESSEE AND HAWKINS COUNTY, TENNESSEE, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, including the State of Tennessee and Hawkins County, Tennessee, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on September 30, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 859 F.2d 20 (6th Cir. 1988), and is reprinted in the appendix hereto, p. 1a *infra*.

The memorandum decision of the United States District Court for the Eastern District of Tennessee (Hull, D.J.) is reported at 661 F. Supp. 857 (E.D. Tenn. 1987), and is reprinted in the appendix hereto, p. 7a, *infra*.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 1345 and 28 U.S.C. § 2201, the respondent brought this suit in the Eastern District of Tennessee, Northeastern Division. On April 10, 1987, the Eastern District granted the repondent's motion for summary judgment. *See* p. 7a, *infra*.

On petitioners' appeal, the Sixth Circuit on September 30, 1988, entered a judgment and an opinion affirming on other grounds the Eastern District's judgment. *See* p. 1a, *infra*. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Tenn. Code Ann. § 67-5-203. Government Property. (a)(1) All property of the United States, all property of the state of Tennessee, of any county, or of any incorporated town, city, or taxing district in the state that is used exclusively for public, county or municipal purposes shall be exempt from taxation; provided, however, that real property purchased for investment purposes by the Tennessee consolidated retirement system shall be subject to property taxation.

* * * * *

(c) All property of the United States or any department or agency thereof, leased or otherwise used for other than an exclusively public purpose by any person, not an agent or instrumentality of the United States, shall be assessed to such user of such property at its value as determined pursuant to § 67-5-601, subject only to a deduction for any restricted use. This subsection (c) shall not affect sales and use taxes imposed on users of federal property by § 67-6-209. . . .

STATEMENT OF THE CASE

Hawkins County, Tennessee levied a tax on a cost-plus private contractor's beneficial use of a federally-owned industrial facility, the Holston Army Ammunition Plant ("Plant"), and federally-owned personal property pursuant to Tenn. Code Ann. § 67-5-203(c). This statute was enacted by the Tennessee legislature to tax such beneficial use so as to equalize the tax burdens of federal contractors with other users and owners of property in the State. The Sixth Circuit held that whatever the legislature intended, Tenn. Code Ann. § 67-5-203(c) "described" an ad valorem tax on an interest in real property and not a tax on the private contractor's beneficial use of the property, and therefore voided the tax.

The private contractor upon which this beneficial use tax was assessed, Holston Defense Corporation ("Holston"), contracts with the United States on a cost-plus basis to produce munitions. Holston, a wholly owned subsidiary of Eastman Kodak Company, is, under the current contract, an independent contractor and not an agent of the United States. Since 1949, Holston has been allowed under its contract to use the 500 or more buildings located on the 6,000-acre plant as well as federally-owned personal property in order to fulfill its contractual obligations. In addition, Holston is reimbursed all its costs incurred in the operation of the plant and receives a negotiated annual fee which on occasion has added incentives, such as for achieving lower costs than targeted. In 1985, cost reimbursements were almost $76,000,000, and the fee over $4,000,000. In the seven-year period ending in 1986, Holston's fees were almost $23,000,000. These profits were passed on by dividends to Holston's parent, Eastman Kodak.

In Tennesee, the principal source of revenues for counties is from general ad valorem property taxation. Although Holston enjoys the benefits of local government, neither Holston nor

Eastman Kodak has ever paid any taxes to Hawkins County. Nor has the United States, Holston or Eastman Kodak ever made any payment-in-lieu-of-taxes to the County.

Article 2, § 28 of the Constitution of the State of Tennessee makes *all* property in the state subject to taxation, but permits the legislature to exempt from taxation property of the state used exclusively for a public purpose and property of religious, educational, charitable and scientific institutions used exclusively for the purposes for which those entities were created. The legislature has granted such exemptions pursuant to Tenn. Code Ann. § 67-5-203(a)(1) and § 67-5-212(a)(1). Thus when property of the state, its political subdivisions and private exempt institutions is used for a purpose other than that for which those entitites were created, the exemption fails and the property is subject to a tax to the extent it is so used. But since under the Supremacy Clause of the United States Constitution (art. VI, cl.2) the property of the United States remains exempt from state taxation regardless of what use is made of it, the legislature could not tax federal property as it does state and other exempt property.

In 1982, Hawkins County sought to equalize the economic burdens of taxation by imposing its general ad valorem real property tax on Holston's use of the federal plant. The County took the position that by virtue of its contractual right to possess and use the government facility in its cost-plus operation, Holston had an interest in real property which was subject to taxation under the existing ad valorem real property tax statutes. The United States brought an action in the district court seeking a declaratory judgment that Holston had no such interest in the property that could be subject to a real property tax. A similar case had previously been filed against Anderson County, Tennessee, in response to its attempt to levy a real property tax against the possession and

use of Union Carbide Corporation, another cost-plus private contractor of the United States.

In each case, the district court rejected the imposition of the real property tax, holding that while Holston's and Union Carbide's possession and use were interests in real property, such interests were not taxable under the state's existing ad valorem real property tax statutes. Both decisions were affirmed by the Sixth Circuit in separate opinions, based upon a decision of the Tennessee Supreme Court in *Union Carbide Corporation v. Alexander*, 679 S.W.2d 938, 940-942 (Tenn. 1984), which held that while the interest of Union Carbide in the government-owned plant could be subject to a privilege or use tax, it was not a real property interest that could be taxed pursuant to the Tennessee ad valorem real property tax statute. The Tennessee Supreme Court specifically stated that "[a] tax burden such as that sought to be imposed on Union Carbide is a matter for the legislature and not this court." *Id.* at 942. *United States v. Anderson County, Tenn.*, 761 F.2d 1169, 1173-74 (6th Cir.), *cert. denied*, 474 U.S. 919 (1985); *United States v. Hawkins County, Tenn.*, No. 85-5533, slip op. (6th Cir. Jan. 8, 1987).

In response to this decision, Tennessee enacted Tenn. Code Ann. § 67-5-203(c) which authorizes counties to impose a tax on users of federal property, with the value of such use to be measured by the value of the federal property *minus a deduction for contractual restrictions on that property's use*, unless the property is used for an exclusively public purpose or the user is an agent or instrumentality of the United States. The property assessor for Hawkins County, Tennessee, a government subdivision of the State of Tennessee, assessed a tax against Holston Defense Corporation in accordance with the provisions of Tenn. Code Ann. § 67-5-203(c). The assessed values were determined by the Hawkins county property

assessor using accepted appraisal methods based on replacement costs provided to the assessor by the Army. Starting with these "replacement costs" the assessor subtracted depreciation to arrive at "current value" *and then reduced that value by an additional forty percent attributed to the contractual restrictions on Holston's use,* in order to arrive at the value of Holston's beneficial use of the federal property. Thus the Tennessee tax is imposed only on the contractor's interest in the property and not on the government's. The statutory rate of assessment for industrial and commercial real property was then applied to arrive at "assessed value." Holston appealed both the valuation and the validity of the assessment to the Tennessee Board of Equalization.[1]

The United States then filed its complaint in this case with the district court questioning the constitutionality of Tenn. Code Ann. § 67-5-203(c), and requesting an injunction against the imposition of the tax. The district court granted the United States' motion for summary judgment, holding that Holston was so closely interrelated with the United States that the purported tax was, in reality, a tax on the underlying government property itself. The Sixth Circuit affirmed this decision on other grounds. It determined that Holston did possess a beneficial use of the government-owned property. Nonetheless, the Sixth Circuit found that Tenn. Code Ann. § 67-5-203(c) "fairly cannot be said to impose a tax on Holston's beneficial use; instead, the statute describes an ad valorem tax on an interest in real property." p. 5a, *infra*. The court

[1]Holston's appeal lies before the State Board of Equalization pending the disposition of the federal suit. The County Assessor's valuation of Holston's beneficial use was the initial assessment in Tennessee pursuant to Tenn. Code Ann. § 67-5-203(c). Under Tennessee's system of taxation, the State Board is charged with the principal responsibility of interpreting the tax code for assessment purposes and of effecting the equalization of taxes throughout the state. Further, its decisions are subject to Judicial review. *See* Tenn. Code Ann. §§ 67-5-1501 - 67-5-1514.

concluded that "Tennessee's attempt to tax Holston resulted in what was, in reality, a tax upon the United States itself." p. 6a, *infra*.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT WHICH HAVE HELD THAT A TAX ON BENEFICIAL USE MAY BE MEASURED BY THE VALUE OF THE FEDERAL GOVERNMENT'S PROPERTY, SO LONG AS A MECHANISM EXISTS TO RESTRICT THE TAX TO THE ACTUAL USE OF THE PROPERTY.

This Court has unequivocally stated that a private contractor's use of federal tax-exempt property in connection with its commercial activities carried on for a profit constitutes "a separate and distinct taxable activity," and that such a tax may be measured by the value of the federal property used. *United States v. New Mexico*, 455 U.S. 720, 733-735 (1982); *United States v. County of Fresno*, 429 U.S. 452, 462-463 n. 10 (1977); *United States v. Township of Muskegon*, 355 U.S. 484, 486-487, (1958); *United States v. City of Detroit*, 355 U.S. 466, 470 (1958), *United States v. Boyd*, 378 U.S. 39, 44-48 (1964). *See also South Carolina v. Baker*, 108 S. Ct. 1355, 1366 (1988); *Washington v. United States*, 460 U.S. 536, 540 (1983).

Since Chief Justice Marshall announced the doctrine of federal immunity in *M'Culloch v. Maryland*, 4 Wheat 316, 4 L.Ed. 579 (1819), this Court has laid down principles on a case by case basis that "strike a proper judicial accommodation between the interests of the States' power to tax and the concerns of the nation ." *United States v. Boyd*, 378 U.S. at 51. The thrust of these decisions has been to broaden the states' taxing powers by narrowing the constitutional limits of the immunity of federal contractors.

In light of this Court's decisions culminating in *United States v. New Mexico*, 455 U.S. at 734-735, there can be little doubt that cost-plus contractors using federal property in the performance of their contracts have a "beneficial use" and a "separate taxable interest" in government property.[2] *New Mexico* definitively shifted the question of federal immunity from ***whether*** federal contractors are immune from state taxation to the question of ***how*** a contractor's "separate taxable interest" in government-owned property may be taxed. The Tennessee statute addresses this by measuring the beneficial use in accordance with the value of the underlying property, after a deduction for restrictions on that use which render the property less valuable to the user.

The Sixth Circuit in rejecting that approach has placed such a peculiar impediment on a state's ability to value "beneficial use" that it, in effect, makes it difficult if not impossible, for a state actually to impose the tax which this Court's decisions have previously authorized. The decision of the Sixth Circuit to invalidate a state use tax by labeling a tax statute — clearly intended by the Tennessee legislature to tax a private contractor's beneficial use of government property — as an ad valorem tax on an interest in property, represents a fundamental departure from, and conflicts with, the governmental tax immunity precedents of this Court.

For instance, in *City of Detroit*, this Court stated that the value of federal property could be used to measure a private contractor's beneficial use of such property. This Court completely rejected the United States' argument that the tax

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[2]*James v. Dravo Contracting Co.*, 302 U.S. 134 (1937); *Alabama v. King & Boozer*, 314 U.S. 1 (1941); *Curry v. United States*, 314 U.S. 14 (1941); *United States v. City of Detroit*, 355 U.S. 466 (1958); *United States v. Boyd*, 378 U.S. 39 (1964); *United States v. County of Fresno*, 429 U.S. 452 (1977); *United States v. New Mexico*, 455 U.S. 720 (1982).

was not constitutionally permissible since it was measured by the value of the property used, reasoning as follows:

> A tax for the beneficial use of property, as distinguished from a tax on the property itself, has long been a commonplace in this country. . . . In measuring such a use tax it seems neither irregular nor extravagant to resort to the value of the property used; indeed no more so than measuring a sales tax by the value of the property sold. Public Act 189 [the Michigan statute imposing the use tax] was apparently designed to equalize the annual tax burden carried by private businesses using exempt property with that of similar businesses using nonexempt property. Other things being the same, it seems obvious enough that use of exempt property is worth as much as use of comparable taxed property during the same interval. In our judgment it was not an impermissible subterfuge but a permissible exercise of its taxing power for Michigan to compute its tax by the value of the property used.

United States v. City of Detroit, 355 U.S. at 470. (Citations omitted). *See also United States v. Township of Muskegon*, 355 U.S. at 485-487.

This principle was reaffirmed by this Court in *County of Fresno*. In that case, the State of California had authorized counties in California to impose an annual use or property tax on possessory interests in improvements on tax-exempt land. The counties of Fresno and Tuolumne imposed this tax on federal employees living in housing owned and supplied to them by the United States Forest Service as part of their compensation. The value of the possessory interest was calculated by estimating the annual fair rental value of the houses and then adjusting that figure downward to reflect certain restrictions on the employees' possession of these homes. *United*

States v. County of Fresno, 429 U.S. at 453-456. This Court sustained the tax as well as the manner in which it was assessed, stating as follows:

> Insofar as it [*United States v. Allegheny County*, 322 U.S. 174, 64 S.Ct. 908, 88 L.Ed. 1209 (1944)] stands for the proposition that Government property used by a private citizen may not be taxed at its full value where contractual restrictions on its use for the Government's benefit render the property less valuable to the user, the case has no application here. Appellee counties have sought to tax only the individual appellant's interests in the Forest Service houses and have reduced their assessments to take account of the limitations of the use of the houses imposed by the Government.

United States v. County of Fresno, 429 U.S. at 462-463, n. 10.

Applying these principles, the Tennessee legislature enacted Tenn. Code Ann. § 67-5-203(c) to tax a private entity's beneficial use of government property. The statute declares that "all property of the United States . . . used for other than an exclusively public purpose by any person, not an agent or instrumentality of the United States, shall be assessed to such user of such property at its value . . . subject only to a deduction for any restricted use." The history of the statute shows that the legislature was attempting to equalize the tax burdens of users of federal tax exempt property with those of owners and other users of property in the state which is exempt from taxation only if it is used for an exclusively public purpose.

In labeling Tenn. Code Ann. § 67-5-203(c) an ad valorem tax on federal property, the Sixth Circuit offered little explanation for its reasoning. If the lower court believed it inappropriate to measure the value of the beneficial use according to the value of the underlying property, subject to a deduc-

tion for restricted use, then, as previously explained, the decision is in clear conflict with prior decisions of this court. Further, the Sixth Circuit erroneously equates Tenn. Code Ann. § 67-5-203(c) with the tax struck down in *United States v. State of Colorado*, 460 F.Supp. 1184 (D. Colo. 1978), *aff'd*, 627 F.2d 217 (10th Cir. 1980), summarily *aff'd sub nom. Jefferson County v. United States*, 450 U.S. 901 (1981). There, the Tenth Circuit Court of Appeals affirmed the district court's opinion holding unconstitutional Colorado's imposition of a tax upon Rockwell International Corporation's use of tax-exempt federal facilities located at the United States' Rocky Flats Plant in Jefferson County, Colorado. A close reading of both the Tenth Circuit's and district court's opinions reveals that the tax was held unconstitutional because it was measured by the value of the Rocky Flats Plant, with no statutory mechanism to segregate Rockwell's interest in the Plant and limit the tax to that interest. *United States v. State of Colorado*, 460 F.Supp. at 1189, *aff'd*, 627 F.2d at 221. However, the Tennessee statute avoids the *Colorado* problem. It segregates and taxes only the portion of the total value of the government property which may be attributed to the contractor's beneficial use. Consequently, even under *Colorado* the Tennesee tax is valid.

In its practical operation and effect the Tennessee tax is identical to those statutes upheld by this Court in *City of Detroit, Township of Muskegon* and *County of Fresno*. The petitioners see no justification for labeling Tenn. Code Ann. § 67-5-203(c) an ad valorem tax on an interest in real property when the state has so carefully adhered to the principles laid down by this Court to tax only beneficial use. In passing on the constitutionality of a state tax, this Court is "concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Lawrence v. State Tax Com.*, 286 U.S. 276, 280 (1932). "This is at least as true to uphold a state tax as to strike one down." *Detroit*

v. Murray Corp., 355 U.S. 489, 492 (1958). As the Sixth Circuit correctly found, a private contractor's beneficial use of federal tax-exempt property is a separate and distinct activity which may be subjected to taxation. The petitioners submit Tenn. Code Ann. § 67-5-203(c) constitutes a proper method whereby such a use may be taxed.

II. THE DECISION BELOW RAISES AN IMPORTANT QUESTION OF NATIONAL SIGNIFICANCE SINCE IT SEVERELY CURTAILS STATES' ABILITY TO TAX PRIVATE CONTRACTOR'S BENEFICIAL USE OF FEDERAL PROPERTY, WHICH THIS COURT HAS RECOGNIZED AS A SEPARATE AND DISTINCT ACTIVITY SUBJECT TO STATE TAXATION, AND THEREBY RESTRICTS THE TAXING POWERS OF THE STATES UNDER THE SUPREMACY CLAUSE.

The Sixth Circuit's decision adversely affects not only Tennessee, but also numerous other states with similar statutes. At least ten (10) states, in addition to Tennessee, have enacted statutes which levy a tax on the possession and use of tax exempt property (including property of the United States) in an attempt to equalize tax burdens within the state. These states are Alaska, Arizona, California, Colorado, Michigan, Minnesota, Montana, Nevada, Oregon and Utah. *See* pp. 16a-20a, *infra* for pertinent provisions of the statutes. Each state, like Tennessee, measures the tax by the value or proportionate value of the underlying property.[3]

This Court has sustained these statutes and their application in Michigan (*United States v. City of Detroit*, 355 U.S. 466; *United States v. Township of Muskegon*, 355 U.S. 484) and California (*United States v. County of Fresno*, 429 U.S. 452). Relying on these decisions, the Supreme Court of Nevada,

[3]Further, the decision impacts any state where federal property is being used by a private contractor in enacting legislation to tax that federal contractor's beneficial use.

Oregon and Utah have upheld the constitutionality of similar statutes. *See United States v. State Ex Rel. Beko,* 493 P.2d 1321 (Nev. 1972); *Sproul v. Gilbert,* 359 P.2d 543 (Or. 1961); *Thiokol Chemical Corp. v. Peterson,* 393 P.2d 391 (Utah 1964).

In fact, one state statute, Oregon Revised Statutes § 307.060, is virtually identical to Tennessee's in its essential features:

T.C.A. § 67-5-203(c)	O.R.S. § 307.060
All property of the United States or any department or agency thereof, leased or otherwise used for other than an exclusively public purpose by any person, not an agent or instrumentality of the United States, shall be assessed to such user of such property at its value as determined pursuant to §67-5-601, subject only to a deduction for any restricted use.	Real and personal property of the United States or any department or agency thereof held by any person under a lease or other interest or estate less than a fee simple, other than under a contract of sale, shall be assessed and taxed as for the full true cash value thereof subject only to deduction for restricted use.

In holding that T.C.A. § 67-5-203(c) is not a use tax statute, but rather an ad valorem tax on an interest in real property, the Sixth Circuit raised questions that have significant practical importance concerning the states' taxing powers under the Supremacy Clause of the Constitution. While it is clear that a state may tax a private contractor's beneficial use of federal property, the Sixth Circuit's opinion so limits the states' power to value such a beneficial use as to bring into question the very power to tax. Indeed, the Sixth Ciruit gives no indication of how beneficial use may be valued, if not by the method adopted by Tennessee.

Where, as here, the application of a state use tax is challenged, the threshold inquiry must be directed to the provisions

of the taxing statute itself. Where the statute by its express terms measures beneficial use by the value of the property and mandates a deduction on the value when there are restrictions on the use, it passes the test of constitutionality.[4] The lower court's decision, if allowed to stand, will cause confusion among the states as to how to draft use tax statutes which are intended to reach "only the contractor's interest in the Government-owned property", *See, New Mexico,* 455 U.S. at 741, n.14. This is a matter of significant concern not only because of the impact it will have on Tennessee, but because the decision itself represents a threat to other states which have adopted essentially similar statutes. The Sixth Circuit's decision undermines states' powers to equalize tax burdens, an action contrary to recent decisions of this Court which have fortified the states' power to levy such use taxes.

The time is ripe for the Court to definitively resolve the method by which a state may tax and value a private contractor's beneficial use of federal property.

[4]It is inappropriate at this point in the proceedings to assume Tennessee will improperly apply the taxing statute.

CONCLUSION

Since the opinion of the Sixth Circuit conflicts with longstanding precedents of this Court and will substantially affect the taxing powers of the states, a writ of certiorari should issue to review the decisions below.

Respectfully submitted,

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APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 87-5478; 87-5479

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HAWKINS COUNTY, Tennessee,
Defendant-Appellant,
(87-5478),

STATE OF TENNESSEE,
Intervenor Defendant-Appellant,
(87-5479).

ON APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided and Filed September 30, 1988

Before: NELSON and NORRIS, Circuit Judges; and SPIEGEL, District Judge.*

ALAN E. NORRIS, Circuit Judge. The State of Tennessee and Hawkins County, Tennessee, appeal the judgment of the district court enjoining them from imposing a tax on a private contractor, Holston Defense Corporation ("Holston"), as cal-

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*The Honorable S. Arthur Spiegel, United States District Judge for the Southern District of Ohio, sitting by designation.

led for by Tenn. Code Ann. § 67-5-203(c). The court concluded that the tax was, in reality, imposed on the federal property used by Holston, and was therefore barred by the Supremacy Clause of the United States Constitution.

Since 1949, Holston has contracted on a cost-plus basis with the United States to operate and maintain the Holston Army Ammunition Plant, a 6,000-acre, federally owned facility used to produce munitions, and located in Hawkins and Sullivan Counties, Tennessee. Under the current contract, Holston is an independent contractor and not an agent of the United States. Munitions are produced at the facility only for the United States, although Holston may perform work at the plant for third parties, if the United States consents. All land, structures, equipment, and vehicles at the facility belong to the government, but over ninety-five percent of the work force is comprised of Holston employees. Holston procures the materials for carrying out the contract, using its own procedures and pledging its own credit to do so, but title to the materials transfers directly from the vendor to the United States. Holston pays no rent and holds no lease. Only the United States may admit or exclude persons from the property. Holston is reimbursed for all allowable expenditures to carry out the contract, including taxes payable by Holston. In addition, Holston receives a negotiated yearly fee, which on occasion has included added incentives, for instance, for achieving lower costs than targeted. In 1985, cost reimbursement was almost $76,000,000, and the fee was over $4,000,000.

Prior to the enactment of the tax statute at issue in this case, Hawkins County attempted to levy an ad valorem real property tax on Holston under another section of the code, on the theory that Holston held a taxable leasehold interest in the property. The United States sought a declaratory judgment that Holston had no property interest in the facility which could be subject to a real property tax. A similar case was filed against Anderson County, Tennessee, in response

to its attempt to levy a real property tax against Union Carbide Corporation, another cost-plus management contractor for the United States.

In each case, the district court rejected imposition of the tax, holding that the rights of Holston and Union Carbide under their contracts were not real property interests. Both decisions were affirmed by this court in separate opinions, based upon on a decision of the Tennessee Supreme Court in *Union Carbide v. Alexander*, 679 S.W.2d 938, 940-42 (Tenn. 1984), which held that, while the interest of Union Carbide could be subject to a privilege or use tax, it was not a real property interest taxable pursuant to Tennessee's ad valorem real property tax statute. *United States v. Anderson County, Tenn.*, 761 F.2d 1169, 1173-74 (6th Cir.), *cert. denied*, 474 U.S. 919 (1985); *United States v. Hawkins County, Tenn.*, No. 85-5533, slip op. (6th Cir., Jan. 8, 1987).

Tennessee's legislature then enacted Tenn. Code Ann. § 67-5-203(c) (Supp. 1987), which provides that property of the United States will be assessed to the user of the property at its real property value, minus a deduction for any contractual restrictions on its use, unless the property is used for an exclusively public purpose, or the user is an agent or instrumentality of the United States.[1] Pursuant to the new tax statute, Hawkins County assessed the tax against Holston.

The amount of the tax was calculated by the property asses-

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[1]67-5-203(c): All property of the United States or any department or agency thereof, leased or otherwise used for other than an exclusively public purpose by any person, not an agent or instrumentality of the United States, shall be assessed to such user of such property at its value as determined pursuant to § 67-5-601, subject only to a deduction for any restricted use. This subsection (c) shall not affect sales and use taxes imposed on users of federal property by § 67-6-209. The provisions of this subsection shall only apply to any county having a population in excess of forty-three thousand (43,000) according to the 1980 federal census or any subsequent federal census.

sor for Hawkins County, on what he called Holston's "use" of the ammunition plant property, based upon information provided by the United States on replacement costs of the real and personal property of the facility. Starting with "replacement cost," he then subtracted depreciation to arrive at "current value," and then reduced that value by an additional forty percent attributed to the contractual restrictions on Holston's use, to obtain the value of "Holston's segregated taxable interest" in the property. The statutory rate of assessment for industrial and commercial real property was then applied to arrive at "assessed value."

The United States filed suit in district court seeking a declaratory judgment that Tenn. Code Ann. § 67-5-203(c) was unconstitutional under the United States and Tennessee Constitutions, and an injunction against the imposition of tax. The lower court granted the government's motion for summary judgment, holding that Holston was so closely interrelated with the United States that the purported use tax was, in reality, a tax on the underlying government property itself.

We affirm the judgment of the district court, albeit on other grounds, for the reasons stated below.

A state may not levy a tax directly upon the United States [*Mayo v.. United States,* 319 U.5. 441, 447 (1943); *reh'g denied,* 320 U.S. 810 (1943); *McCulloch v. Maryland,* 17 U.S. (4 Wheat) 316 (1819)], or its closely connected agent or instrumentality. *United States v. New Mexico,* 45S U.S. 720, 735 (1982). The use of property of the United States may be taxed to a private contractor, even if the economic burden of the tax is ultimately borne by the United States, but only to the extent that the contractor has the beneficial use of the property. That is, a contractor may not be taxed beyond the value of his use. The use of property in connection with commercial activities carried on for profit is a separate and distinct taxable activity. *See id.* at 734-35, 741 n.14; *United States v. Boyd,* 378 U.S. 39, 44 (1964).

A cost-plus contractor for profit, Holston is not "so incorporated into the government structure as to become [an] instrumentalit[y] of the United States and thus enjoy governmental immunity." *Boyd,* 378 U.S. at 48. Holston produces munitions solely for the United States, and receives a negotiated, fixed fee in addition to its reimbursement for costs. This fee, of course, represents its profit. It is inescapable, then, that Holston has a beneficial use of the government-owned property.

However, Tenn. Code Ann. § 67-5-203(c) fairly cannot be said to impose a tax on Holston's beneficial use; instead, the statute describes an ad valorem tax on an interest in real property. The tax contemplated is similar to the one the State of Colorado attempted to impose on a corporation which, pursuant to a management contract, operated a federally owned nuclear weapons plant. Under the Colorado statute, if real property which was exempt from taxation was used by a corporation in connection with a business operated for profit, then the user of the property was subject to taxation as if it were the owner of the property. The Supreme Court affirmed the holding of the Tenth Circuit Court of Appeals, that "the 'substance' of the present procedure is not to tax [the corporation's] 'use' of government owned property, but to lay an ad valorem general property tax on property owned by the United States." *United States v. Colorado,* 627 F.2d 217 (10th Cir. 1980), *aff'd sub nom. Jefferson County, Colo. v. United States,* 450 U.S. 901 (1981).

The Tennessee statute provides that "all property of the United States" used for other than an exclusively public purpose is to be assessed to its user at a value determined pursuant to other sections of the code which spell out the procedure for calculating the value of real property for purposes of the state's ad valorem tax, "subject only to a deduction for any restricted use." The property assessor for Hawkins County said he started by determining the value of the facility pursuant to a commonly accepted method of appraising real prop-

erty, then reduced the value of the ammunition plant property to reflect the contractual restrictions on Holston's use. He then assessed the property to Holston at forty percent of its value, pursuant to Tenn. Code Ann. § 67-5-801 (1983), which determines the classification and rate of assessment for real property. The value he assigned to Holston in this instance was the same one he had previously assigned to the company when the county had unsuccessfully contended that Holston held a leasehold interest and attempted to impose the ad valorem real property tax.

Whether or not the Tennessee legislature had in mind a tax on beneficial use, it unquestionably did not describe one when it enacted the statute in question. Since Holston has been determined not to have a real property interest in the facility, Tennessee's attempt to tax Holston resulted in what was, in reality, a tax upon the United States itself.

The judgment of the district court is **affirmed**.

UNITED STATES of America

v.

HAWKINS COUNTY, TENNESSEE, Dan Brooks, Hawkins County Executive, Jerry Stewart, Hawkins County Trustee, Grady Marshall, Hawkins County PropertyAssessor and 21 members of the Hawkins County Commission,

State of Tennessee
(Intervening Defendnat).

No. CIV-2-86-201.

United States District Court,
E.D. Tennessee,
Northeastern Division.

April 10, 1987.

. . . . .

J. Edgar Schmutzer, Asst. U.S. Atty., Greeneville, Tenn., John J. McCarthy, Richard Correa, Washington, D.C., for plaintiff.

George John Keto, Washington, D.C., and James O. Phillips, III, Phillips & Hale, Rogersville, Tenn., for all defendants except intervening defendant.

W.J. Michael Cody, Atty. Gen., State of Tenn., Nashville, Tenn., for intervening defendant.

MEMORANDUM AND ORDER

HULL, Chief Judge.

This action for declaratory and injunctive relief came before the Court for a hearing on March 26, 1987, following the parties' filing of cross-motions for summary judgment. Plaintiff, the United States of America, seeks a declaratory ruling that Tennessee Code Annotated § 67-5-203(c) is unconstitutional and a permament injunction to preclude defendants from assessing a "use" tax, pursuant to § 67-5-203(c), upon Holston Defense Corporation, a private federal contractor. Defendants deny that § 67-5-203(c) is unconstitutional and deny that the use tax levied against Holston Defense Corporation violates the Supremacy Clause. Nevertheless, after careful consideration of the facts, legal precedent, and the record as a whole, the Court finds that T.C.A. § 67-5-203(c), as applied to Holston Valley Defense, does violate the Supremacy Clause of the United States Constitution for the reasons stated below.

The contested statute, Tennessee Code Annotated § 67-5-203, as amended by subsection (c), states as follows:

> 67-5-203 Government property.—(a)(i) All property of the United States, all property of the State of Tennessee, of any county, or of any incorporated town, city, or taxing district in the state that is used exclusively for public, county, or municipal purposes shall be exempt from taxation.
>
> . . . .
>
> (c) All property of the United States or any department or agency thereof, leased or otherwise used for other than an exclusively public purpose by any person, not an agent or instrumentality of the United States, shall be assessed to such user of such property at its value as determined pursuant to § 66-5-601, subject only to a deduction for any restricted use. This subsection shall not affect sales and use taxes imposed on users of federal property by § 67-6-209.

Relying upon § 67-5-203(c), the property assessor for Hawkins County, Tennessee assessed a "use" tax of $8,125,239.32 against Holston Defense Corporation (Holston) for 1986. The tax was levied on the value of Holston's use of federal property at the Holston Army Ammunition Plant, which is owned by the United States and consists of 6,024 acres of land located in Hawkins and Sullivan Counties, Tennessee. The United States, which has maintained facilities for the production of explosives at the site since World War II, contracts with Holston to operate and manage its munitions plant pursuant to Government Contracdt No. DAAA09-83-C-4515. The government pays Holston an annual fixed fee and reimburses Holston for its costs of operation.

Nevertheless, the government maintains exclusive control of the plant. For example, the contract specifies that Holston must produce munitions exclusively for the United States, which assumes immediate title to the products without purchasing them; that Holston may not perform work on behalf of itself or any other private entity; and that Holston's right of access to the plant is limited to performing its contractual duties. Holston does not hold title, leasehold, or license to any government property.

Furthermore, while Holston has great expertise in producing munitions, Holston's efforts are subject to strict governmental control and supervision. For example, in accordance with its contract, Holston follows production schedules and stringent safety regulations promulgated by the United States Army. In addition, Holston must produce the explosives according to processes developed by the Army.

After analyzing this contract and the relationship between Holston and the government in 1985, this Court found that Holston owned no property interest in the plant and enjoined Hawkins County from assessing an *ad valorem* real property

tax against Holston. United States v. Hawkins County, Tennessee, ____ F.Supp. ____ (Civil Action No. 2-84-35, April 5, 1985), *aff'd*, 812 F.2d 1409 (6th Cir.1987). Subsequently, however, Tennessee enacted T.C.A. § 67-5-203(c).

Defendant Hawkins County and intervenor defendant, the State of Tennessee, argue that local authorities may tax a private corporation for its use of federal property in its commercial activities without offending the Supremacy Clause of the United States Constitution. Additionally, they argue that Hawkins County properly assessed a use tax against Holston pursuant to T.C.A. § 67-5-203(c) and that the use tax and its application to Holston should be upheld.

In *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 431, 4 L.Ed. 579 (1819), Chief Justice Marshall first declared that the federal government and its property are immune from state taxation. "In so doing he introduced the Court to what has become a 'much litigated and often confusing field'; one that has been marked from the beginning by inconsistent decisions and excessively delicate distinctions.'" *United States v. New Mexico*, 455 U.S. 720, 730, 102 S.Ct. 1373, 1380, 71 L.Ed.2d 580 (1982), *quoting, United States v. City of Detroit*, 355 U.S. 466, 473, 78 S.Ct. 474, 478, 2 L.Ed.2d 424 (1958).

Determining when a state might constitutionally tax contractors that provide services to the federal government, as the Court must do in this cae, has been particularly troublesome. In *Jones v. Dravo Contracting Co.*, 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155 (1937), for example, the Supreme Court upheld a state tax on the gross receipts of a federal contractor, and in *Alabama v. King & Boozer*, 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3 (1941), the Court held that the state might impose a tax on sales to federal contractors. In *United States v. Boyd*, 378 U.S. 39, 84 S.Ct. 1518, 12 L.Ed.2d 713 (1964), the Court upheld a use tax upon purchases made by

the contractor on behalf of the United States; and in *United States v. City of Detroit*, 355 U.S. 466, 78 S.Ct. 474, 2 L.Ed.2d 424 (1958), the Court stated that a use tax upon the lessee of a portion of a federal industrial plant was not repugnant to the Constitution. Similarly, the Court held, in *United States v. Township of Muskegon*, 355 U.S. 484, 78 S.Ct. 483, 2 L.Ed.2d 436 (1958), that a state may tax the use of federal property where a contractor made and sold goods to the United States for a profit.

More recently, the Court sanctioned New Mexico's imposition of a gross receipts tax and a compensating use tax on federal contractors who purchased tangible property for the federal government under an advanced funding procedure. *United States v. New Mexico, supra*. Similarly, the Court approved Washington's sales tax on materials sold to federal contractors in *Washington v. United States*, 460 U.S. 536, 103 S.Ct. 1344, 75 L.Ed.2d 264 (1983).

Nevertheless, the Court struck down state taxes in *United States v. Allegheny County*, 322 U.S. 174 (1944) (where the state sought to tax the value of federal machinery held by a private property); in *Livingston v. United States*, 364 U.S. 281 (1960) (where the Court summarily affirmed the invalidation of a state use tax imposed against a federal contractor); and in *Jefferson County v. United States*, 450 U.S. 901 (1981) (where the Court summarily affirmed the tenth circuit's holding (*United States v. State of Colorado*, 627 F.2d 217 (1980)) that a state may not impose a use tax on a private company acting under a management contract with the United States).

While these cases appear to conflict in many particulars, in each case a single consideration was paramount: the closeness of the interrelationship between the contractor and the United States Government. For example, *New Mexico, supra*, offers the following standard for measuring the appropriateness of taxing federal contractors:

> [T]ax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned.

455 U.S., at 736, 102 S.Ct., at 1383.

Two cases, *United States v. Township of Muskegon, supra.*, principally relied upon by the defendants, and *United States v. Colorado, supra.*, cited by the plaintiff, demonstrate the courts' application of this standard and serve as a point of distinction in resolving this case. In fact, the pertinent facts in *Colorado* are virtually identical to those in this case, while those in *Colorado* and the other cases relied upon by the defendants, although similar, are distinguishable in one critical area — the closeness of the interrelationship between the government and the contractor.

In *Colorado,* for example, as in this case, the state attempted to assess a use tax against a federal contractor producing weapons for national defense. The state authorized county governments to levy a tax against corporations which "leased, loaned, or . . . used" federal property "in connection with a business conducted for profit." Colo.Rev.Stat. § 39-3-112 (Supp. 1979). Rockwell, the federal contractor in *Colorado,* like Holston in the instant case, had a management contract with the United States to perform services on government property, which the United States owned in fee simple. Rockwell, like Holston, did not have a lease, permit, or license to the property; and its "use" of the property was strictly delineated by the management contract. As with Holston, the government paid Rockwell a fixed fee and reimbursed it for its costs. Like Holston, also, Rockwell provided services only and did not sell products to the United States or to any other party for a profit.

"[T]he key to the present problem," the *Colorado* court stated, "is the relationship between Rockwell and the United States and the nature of the activity which the State of Colorado seeks to tax." 627 F.2d., at 219. After analyzing the relationship between Rockwell and the government in light of the aforementioned facts, the tenth circuit held, and the Supreme Court, affirmed, that Colorado's taxing of Rockwell for its "use" of government property was "in reality a tax on the property itself and, as such, barred under the doctrine of implied immunity first found in *McCulloch v. Maryland* . . . ." 627 F.2d, at 219.

In *Muskegon*, on the other hand, the government permitted Continental Motors Corporation to use government facilities to manufacture Continental's goods, then sell them to the government. Pursuant to state law, the township levied a tax against Continental because of its use of tax-exempt property in its private business. Although the United States protested that the tax was invalid, the Supreme Court upheld the tax, explaining:

> The vital thing . . . is that Continental was using the property in connection with its own commercial activities. . . . [T]he fact that Continental was carrying out a contract with the Government does not materially alter the case. Continental was still acting as a *private enterprise selling goods to the United States*. In a certain loose way it might be called an "instrumentality" of the United States, but no more so than any other private party supplying goods for his own gain to the Government.

355 U.S., at 486-87, 78 S.Ct., at 485 (emphasis supplied).

Admittedly, the circumstances of *Muskegon* closely resemble those in *Colorado* and this case. Nevertheless, *Muskegon* is distinguishable, as demonstrated by the Supreme Court's decision to summarily affirm *Colorado* thirteen years after *Muskegon*. In *Muskegon*, for example, the Court emphasizes Con-

tinental's independence from government control, its "acting as a private enterprise selling goods to the United States." By contrast, Holston (like Rockwell) is much more closely interrelated to the government, as evidenced by the degree of control the government exerts over it. For example, Holston does not sell goods to the United States or to any other party. The goods already belong to the government. Holston merely manages and oversees the government's own production of goods. In other words, while Holston is an independent entity, it is not using government property to produce goods for sale in its own commercial activities. Manufacturing munitions at the Holston Army Ammunition Plant is a governmental activity which Holston manages.

The *Muskegon* Court also emphasizes Continental's freedom in using government property:

> [H]ere Continental was not so assimilated by the Government as to become one of its constituent parts. It was free within broad limits to use the property as it thought advantageous and convenient in performing its contracts and maximizing its profits from them.

355 U.S., at 486, 78 S.Ct., at 485. In fact, while a formal lease may not have existed, the Court notes that Continental essentially paid rent by reducing the price of the goods it sold to the government. *Id.*, at 485, 78 S.Ct., at 485.

Holston, on the other hand, must use the property according to strict government direction. It must follow government manufacturing methods and production timetables, as well as government safety and environmental regulations. It has no lease, formal or informal, and, of course, cannot use the property to maximize profits. Therefore, the Court finds that *Colorado*, not *Muskegon* controls this action.

Other cases relied upon by the defendants can be readily distinguished. For example, in *United States v. City of Detroit*,

supra., the federal contractor leased property from the United States and sold its goods to private companies, as well as to the government. Furthermore, while "use" taxes were levied in *United States v. Boyd, supra.; United States v. New Mexico, supra.;* and *Washington v. United States, supra.;* in each instance, the use taxes were merely enforcement mechanisms for gross receipt or sales taxes.

Accordingly, after analyzing the circumstances of this case in light of *Colorado, Muskegon,* and the other cases cited by the parties, it appears to the Court that Holston, like Rockwell, is so closely interrelated with the government that the "use" tax on Holston is, in reality, a tax on the underlying government property.

Therefore, the Court finds that defendants' levying of a tax on Holston's use of federal property at the Holston Army Ammunition Plant is an impermissible tax on the property itself, and, as such, is barred by the Supremacy Clause of the United States Constitution. Accordingly, it is hereby ORDERED that defendants are hereby permanently ENJOINED from imposing a use tax under T.C.A. § 67-5-203(c) against the Holston Defense Corporation for its use of government property at the Holston Army Ammunition Plant.

Constitution of Alaska

Section 5. Interests in Government Property. Private leaseholds, contracts, or interests in land or property owned or held by the United States, the State, or its political subdivisions shall be taxable to the extent of the interests.

Ariz. Rev. Stat. Ann. (1987 Supp.)

§ 42-681. Definitions

In this article, unless the context otherwise requires:

* * * * *

3. "Possessory interest" means possession of land or improvements, or both, regardless of how the interest is identified in any document by which it is created, except possession pursuant to and by virtue of ownership of a freehold interest in the land or ownership of the improvements.

§ 42-682. Taxation of possessory interests

Possessory interests in the property of federal, state, county or municipal governments, and subdivisions thereof, are subject to taxation as unsecured personal property under this chapter.

§ 42-683. Valuation of possessory interests; delinquency

A. The value of a possessory interest is the value determined acording to standard appraisal methods prescribed by the department.

B. Possessory interests are subject to the procedures prescribed by this chapter for collection and payment of delinquent taxes.

Cal. [Rev. and Taxation] Code (West 1987)

Section 107, provides:

"Possessory interests" means the following:

(a) Possession of, claim to, or right to the possession of land or improvements, except when coupled with ownership of the land or improvements in the same person.

Title 18, Cal. Adm. Code ¶21(b), provides:

(b) "Taxable possessory interest" means a possessory interest in non-taxable publicly owned real property, as such property is defined in section 104 of the Revenue and Taxation Code. . . ."

Section 104, provides:

"Real estate" or "real property" includes:

(a) The possession of, claim to, ownership of, or right to the possession of land.

Colo. Rev. Stat. § 39-3-112 (1982 and 1987 Supp.)

(1) When any real property . . . exempt from taxation is leased, loaned, or otherwise made available to and used by a . . . corporation in connection with a business conducted for profit, the lessee or user thereof shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property. . . .

Mich. Comp. Laws Ann. (1986)

211.81. Taxation of lessees or users of tax-exempt property; exceptions

Sec. 1 (1) When any real property which for any reason is

exempt from ad valorem property taxation is leased, loaned, or otherwise made available to and used by a private individual, association, or corporation in connection with a business conducted for profit, the lessees or users of this real property; shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of this real property.

(2) Subsection (1) shall not apply to:

(a) Federal property for which payments are made instead of ad valorem property taxes in amounts equivalent to taxes which might otherwise be lawfully assessed. . . .

Minn. Statute Ann. (West 1988 Supp.)

272.01 Property subject to taxation

Subd. 2. (a) When any real or personal property which for any reason is exempt from ad valorem taxes, and taxes in lieu thereof, is leased, loaned, or otherwise made available and used by a private individual, association, or corporation in connection with a business conducted for profit, there shall be imposed a tax, for the privilege of so using or possessing such real or personal property, in the same amount and to the same extent as though the lessee or user was the owner of such property.

Mont. Code Ann. (1987)

15-24-1101. Federal property held under contract by private person subject to taxation. Real and/or personal property of the United States or any department or agency thereof held under contract of sale, lease or other interest or estate therein by any person for his exclusive use, shall be subject to assessment for ad valorem property taxation as provided in this part; provided that this part shall not apply

to real property held, and in immediate use and occupation by this state or any county, municipal corporation, or political subdivision therein.

Nev. Rev. Stat. (1987 Supp.)

361.157. Exempt real estate subject to taxation if used in business conducted for profit; exemptions.

1. When any real estate which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a natural person, association, partnership or corporation in connection with a business conducted for profit, it is subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of the real estate.

3. Subsection 1 does not apply to:

* * * * *

(b) Federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed;

* * * * *

4. Taxes must be assessed to lessees or users of exempt real estate and collected in the same manner as taxes assessed to owners of other real estate, except that taxes due under this section do not become a lien against the property.

361.159. Exempt personal property subject to taxation if used in business conducted for profit.

1. Personal property exempt from taxation which is leased, loaned or otherwise made available to and used by a natural person, association or corporation in connection with a business conducted for profit is subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of the property. . .

2. Taxes must be assessed to lessees or users of exempt personal property and collected in the same manner as taxes assessed to owners of other personal property, ...

Or. Rev. Statutes (1986)

307.060 Taxation of property that is leased from the United States

Real and personal property of the United States or any department or agency thereof held by any person under a lease or other interest or estate less than a fee simple, other than under a contract of sale, shall be assessed and taxed as for the full true cash value thereof subject only to deduction for restricted use.

Utah Code Ann. (1987 Repl.)

59-4-101. Tax basis — Exceptions — Assessment and Collection.

(1) A tax is imposed on the possession or other beneficial use enjoyed by any person of any real or personal property which for any reason is exempt from taxation, if that property is used in connection with a business conducted for profit.

(2) The tax imposed under this chapter is the same amount that the ad valorem property tax would be if the possessor or user were the owner of the property. The amount of any payments which are made in lieu of taxes is credited against the tax imposed on the beneficial use of property owned by the Federal Government.

Supreme Court, U.S.
FILED
FEB 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1072

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF TENNESSEE,
HAWKINS COUNTY, TENNESSEE, et al.

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

AMICUS BRIEF FOR THE STATE OF SOUTH DAKOTA, ET AL., IN SUPPORT OF THE WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Can a state impose a tax on a private contractor's beneficial use of federal property and measure that tax by the value of the federal property, minus a deduction for any restricted use, in an effort to equalize taxation of federal contractors with that of owners and other users of property in the state, without violating the Supremacy Clause of the United States Constitution?

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NO. 88-1072

IN THE

SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1988

STATE OF TENNESSEE,
HAWKINS COUNTY, TENNESSEE, et al.

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

The amici states[1] urge that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-titled proceeding on September 30,

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[1]This brief is filed on behalf of the states, and their attorneys general, listed in Appendix A.

1988, and reported at 859 F.2d 20 (6th Cir. 1988).

INTEREST OF AMICI STATES

The amici states have a significant interest in the outcome of this case. A number of the amici states[2] have statutes similar to Tenn. Code Ann. § 67-5-203(c) in that such statutes tax the beneficial interest of a private contractor in a contract or lease with the federal government to operate a federal facility. Federally owned facilities operated by private

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[2] In particular South Dakota: S.D. Codified Laws Ann. §§ 10-4-2; 10-4-2.1 and 10-4-23; Michigan: Mich. Comp. Laws Ann. § 211.81; Minnesota: Minn. Stat. Ann. § 272.01; Nevada: Nev. Rev. Stat. § 361.157; Colorado: Colo. Rev. Stat. § 39-3-112; Virginia: Va. Code Ann. § 58.1-3502; Utah: Utah Code Ann. § 59-4-101, have statutes imposing a tax on a private contractor's beneficial use of a contract or lease to operate otherwise exempt property, including federal property.

contractors exist in all of the amici states. Thus, the ability of amici states to impose such a tax upon the private contractors is clearly affected by the decision of the Sixth Circuit in this case.

Beyond the specific issue at hand, that of a private contractor's interest in a contract to operate a federal facility, the amici states are concerned about the Sixth Circuit's overly broad interpretation of the Supremacy Clause, which would prohibit the states from exercising their traditional functions, such as taxation. If the amici states and their local governments are to shoulder additional responsibilities that have heretofore been functions of the federal government, they must continue to be afforded traditional state taxing powers in order to meet these new responsibilities.

The amici states believe that they are in a unique position to assist this Court in

understanding why this case should be granted review. Obviously, the constitutionality of Tenn. Code Ann. § 67-5-203(c) is an important issue to the State of Tennessee. Moreover, when the decision of a circuit greatly impacts the manner in which every state in this union can exercise a traditional state power, as such taxation, serious consideration should be given to granting review.

STATEMENT OF THE CASE

The amici states adopt the statement of the case as presented by petitioners. See Petition for Writ of Certiorari for the State of Tennessee, et al., at 3-7.

REASONS FOR GRANTING REVIEW

THE DECISION OF THE SIXTH CIRCUIT, HOLDING THAT A STATE MAY NOT IMPOSE A TAX ON A PRIVATE CONTRACTOR'S BENEFICIAL USE OF A CONTRACT WITH THE FEDERAL GOVERNMENT, WHERE THE INTEREST IS MEASURED BY THE VALUE OF THE FEDERAL PROPERTY LESS ANY RESTRICTED USES, RAISES AN IMPORTANT QUESTION UNDER THE

SUPREMACY CLAUSE, WHICH HAS YET TO BE, BUT SHOULD BE, SETTLED BY THIS COURT.

There is no dispute that every state has the power to tax a private contractor's use of federal tax exempt property in connection with its commercial activities carried on in the state for profit. In the case of United States v. New Mexico, 455 U.S. 720, 733-35 (1982), this Court held that where a private contractor operates a federal facility and has a "beneficial use" in that contract, there is a separate taxable interest in the private contract. Taxing this interest does not impose a tax upon the federal government. See United States v. City of Detroit, 355 U.S. 466, 470 (1958) (tax for the beneficial use of property, as distinguished from a tax on the property itself, has long been commonplace in this country); United States v. County of Fresno, 429 U.S. 452, 462-63, n.10 (1977) (county had the power to tax an

individual's leasehold interest in the Forest Service's houses without violating the Supremacy Clause). Thus, it can be said with some assurance that there is no violation of the Supremacy Clause where a state imposes a tax upon the beneficial use that a private contractor has in a contract to operate a federal facility.

The dispute in this case arises because of the methodology used by the State of Tennessee in computing the "beneficial use" tax. Tenn. Code Ann. § 67-5-203(c) provides that all property of the United States leased or otherwise used for other than an exclusive public purpose by any person, not an agent or instrumentality of the United States, will be assessed to the user of such property at its value subject to a deduction for any restricted use. The Sixth Circuit struck down the Tennessee statute as an attempt to do indirectly what the State cannot do

directly, i.e., impose an ad valorem property tax on the federal government. the Sixth Circuit reasoned that since the method of valuation of the beneficial use for the private contractor included in the formula the value of the federal property, such a tax was essentially an ad valorem property tax on the federal government.

Such a line of reasoning would severely restrict, if not totally emasculate, the amici states' ability to impose a tax on private contractors, which this Court has previously sanctioned in the New Mexico case. It would be impossible, or extremely difficult, for a state to measure the "beneficial use" that a private contractor has in a contract to operate a federal

facility without considering the value of the facility as one of the factors.[3]

Private contractors operate federal facilities throughout this country. The amici states are unaware of the total number of private contractors who operate federal facilities or even the total number of states in which such facilities are operated. The amici statutes would venture to assert, however, that there may be a federal facility operated by a private contractor in every state in this country. This renders the question raised one of national, not just state or regional, significance.

---

[3]Although the formula for determining the private contractor's beneficial interest is not worded in the same manner in each of the amici states' statutes, the value of the underlying federal property is a factor considered in all of the statutes. Thus, the decision of the Sixth Circuit would nullify those statutes if applied to them.

The amici states are attempting to impose a tax on the "beneficial use" to the private contractors of contracts to operate federal facilities. The fact that the private contractor may pass along this increased tax burden to the federal government does not mean that there is a Supremacy Clause violation, so long as the federal government is treated the same as others similarly situated. United States v. City of Detroit, 355 U.S. at 473-474. The Sixth Circuit, in its opinion, did not find or hold that Tenn. Code Ann. § 67-5-203(c) discriminated against private contractors operating federal facilities versus private contractors similarly situated who do not operate federal facilities.

Such a broad reading of the Supremacy Clause concerns the amici states. With state responsibility over areas once under federal control increasing in the past several years,

the budgets of state and local governments have become very tight. Therefore, state and local governments must look to all possible sources of revenue, including those of private enterprises that do business with the federal government, in order to meet these new responsibilities.

The question presented for review in this case undoubtedly goes to the heart of an important federal issue, which has not yet been, but should be, decided by this Court. How broad should the Supremacy Clause be where a state attempts to tax a private contractor's interest in a contract to operate a federal facility? An overly broad interpretation would immunize private enterprises doing business with the federal government, thereby removing what could be for some state and local governments a significant revenue source. The amici states contend that the Supremacy Clause was never

intended to prohibit the states from imposing such a tax.

CONCLUSION

The amici states believe that the issue presented in this case is of national importance, in that it concerns the ability of all states to tax private federal contractors equally with others. This Court has previously permitted non-discriminatory taxation of these contractors. Accordingly, the amici states urge this Court to grant the petition for writ of certiorari.

Dated this 24th day of February, 1989.

Respectfully submitted,

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(3)

No. 88-1072

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In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF TENNESSEE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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10PP

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1072

STATE OF TENNESSEE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that Tennessee's local ad valorem property tax, as amended in 1986 by the addition of Tenn. Code Ann. § 67-5-203(c) (Supp. 1988), may be imposed on a private contractor's use of a federally owned munitions plant that is managed by the contractor for the government pursuant to a cost-plus contract. The court of appeals held that the tax asserted under Section 67-5-203(c) was not imposed on the contractor's beneficial use but was, in reality, imposed on the property of the United States and was therefore unconstitutional (Pet. App. 6a).

1. Since 1949, Holston Defense Corporation has contracted with the United States to manage the Holston Army Ammunition Plant, a federally owned facility located in Hawkins and Sullivan Counties, Tennessee (Pet. App. 2a, 9a). Under the contract, Holston produces

munitions exclusively for the United States, which assumes immediate title to the products without purchasing them. Holston does not hold title to, or a leasehold interest in, any government property. Holston's right of access to the plant is limited to performing its contractual duties; Holston does not perform work on behalf of itself or any other private entity. Holston's activities, moreover, are subject to strict government control and supervision. Pet. App. 9a. Holston procures the materials for carrying out the contract, using its own procedures and pledging its own credit, but title to the materials is transferred directly from the vendor to the United States. Holston is reimbursed for all allowable expenditures to carry out the contract, including taxes payable by Holston. Pet. App. 2a. In addition, Holston receives a negotiated yearly fee, which was $3.8 million for 1986 (Pet. App. 2a, 9a; C.A. App. 123).

Prior to the amendment of the tax statute at issue here, Hawkins County attempted to impose Tennessee's property tax on Holston on the theory that Holston held a taxable property interest in the plant. The United States sought a declaratory judgment that Holston had no property interest in the facility that could be subject to the property tax. A similar case was filed against Anderson County, Tennessee, in response to its attempt to impose the same real property tax against Union Carbide Corporation, another cost-plus management contractor for the United States. In each case, the district court rejected imposition of the tax, holding that the rights of Holston and Union Carbide under their contracts were not real property interests. Both decisions were affirmed by the Sixth Circuit based upon a decision of the Tennessee Supreme Court in *Union Carbide* v. *Alexander,* 679 S.W.2d 938, 940-942 (Tenn. 1984), which held that, while the interest of Union Carbide might be subject to a privi-

lege or use tax, it was not a real property interest taxable under Tennessee's ad valorem real property tax statute. *United States* v. *Anderson County, Tenn.*, 761 F.2d 1169, 1173-1174 (6th Cir. 1985), cert. denied, 474 U.S. 919 (1985); *United States* v. *Hawkins County, Tenn.*, 812 F.2d 1409 (6th Cir. 1987).

2. In 1986, Tennessee's legislature amended Tenn. Code Ann. § 67-5-203—which generally exempts federal, state, and local government property from Tennessee's property taxes—by adding subsection (c), which provides that all property of the United States used for other than an exclusively public purpose by any person not an agent or instrumentality of the United States will be taxed to such user at its property tax value minus a deduction for any restricted use.[1] Pursuant to the amended statute, Hawkins County assessed the tax at issue here for 1986 in the amount of $8,125,239.32 (Pet. App. 9a). The amount of the tax was calculated by the property assessor for Hawkins County by applying the statutory rate of assessment for industrial and commercial real property to the "current value" of the government property reduced by 40% to take account of contractual restrictions on Holston's use of the property. Pet. App. 4a.

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[1] Section 67-5-203(c) provides:

> All property of the United States or any department or agency thereof, leased or otherwise used for other than an exclusively public purpose by any person, not an agent or instrumentality of the United States, shall be assessed to such user of such property at its value as determined pursuant to § 67-5-601, subject only to a deduction for any restricted use. This subsection (c) shall not affect sales and use taxes imposed on users of federal property by § 67-6-209. The provisions of this subsection shall only apply to any county having a population in excess of forty-three thousand (43,000) according to the 1980 federal census or any subsequent federal census.

The United States filed suit in district court seeking declaratory and injunctive relief from the tax on a variety of grounds. The district court granted summary judgment for the government, holding that Holston was so closely interrelated with the United States that the purported use tax was, in reality, a tax on the underlying government property. Pet. App. 15a. The court of appeals affirmed (Pet. App. 1a-6a) on slightly different grounds. The court acknowledged (Pet. App. 5a) that Holston, as a cost-plus contractor for profit, was potentially subject to taxation for its beneficial use of the government-owned property. The court concluded (*ibid.*), however, that "Tenn. Code Ann. § 67-5-203(c) fairly cannot be said to impose a tax on Holston's beneficial use; instead, the statute describes an ad valorem tax on an interest in real property." The court noted (Pet. App. 6a) that the property was assessed "at forty percent of its value, pursuant to Tenn. Code Ann. § 67-5-801 (1983), which determines the classification and rate of assessment for real property. The value [the assessor] assigned to Holston in this instance," the court stressed (*ibid.*), "was the same one he had previously assigned to the company when the county had unsuccessfully contended that Holston held a leasehold interest and attempted to impose the ad valorem real property tax." The court accordingly concluded (*ibid.*) that the tax in question here was not a permissible tax on Holston's beneficial use of the property, but rather an impermissible tax on property wholly owned by the United States.

3. The court of appeals correctly held that the Tennessee statute as applied in this case taxed the federal government's property. The tax was therefore constitutionally impermissible. "[U]nshaken, rarely questioned * * * is the principle that possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state

taxation." *United States* v. *County of Allegheny,* 322 U.S. 174, 177 (1944). See also *United States* v. *County of Fresno,* 429 U.S. 452, 459 (1977); *United States* v. *Tax Commission of Mississippi,* 421 U.S. 599, 612-613 (1975); *Department of Employment* v. *United States,* 385 U.S. 355, 358-359 (1966); *M'Culloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316 (1819).

It is well established that a local tax may constitutionally be imposed upon the use by a private corporation of property owned by the United States and leased to the private party for use in its business, even where that business is exclusively devoted to providing goods or services to the United States. *United States* v. *County of Fresno,* 429 U.S. 452, 462-463 (1977); *United States* v. *City of Detroit,* 355 U.S. 466, 470 (1958); *United States* v. *Township of Muskegon,* 355 U.S. 484, 486 (1958). But it is equally clear that where a tax fails to identify, segregate and evaluate the private party's interest in the property owned by the federal government, and is based on a value exceeding the private party's interest in that property, the tax is on the federal government's property and violates the United States' immunity from local taxation. *United States* v. *County of Fresno,* 429 U.S. at 462-463 n.10; *United States* v. *County of Allegheny,* 322 U.S. at 186-187.

In *United States* v. *Colorado,* 627 F.2d 217, 221 (1980), aff'd *sub nom. Jefferson County, Colo.* v. *United States,* 450 U.S. 901 (1981), the Tenth Circuit struck down a tax similar to that at issue here that Colorado attempted to impose on a corporation operating a federally owned nuclear weapons plant pursuant to a management contract. Under the Colorado statute, if real property that was exempt from taxation was used by a corporation in connection with a business operated for profit, then the user of the property was subject to taxation as if it were the owner of the property. This Court affirmed the conclusion of the

Tenth Circuit that "the 'substance' of the present procedure is not to tax [the corporation's] 'use' of government owned property, but to lay an ad valorem general property tax on property owned by the United States."

Petitioners contend (Pet. 8, 11) that the Tennessee statute is distinguishable from the invalid Colorado statute because it segregates and measures "beneficial use" by deducting from the property's value any restrictions on its use. The court of appeals properly rejected this argument. Section 67-5-203(c) does not impose a tax on Holston's beneficial use but, instead, describes an ad valorem tax on the property of the United States. This section is found in Chapter 5 of Title 67 (Tenn. Stat. Ann.), which pertains only to property taxes. Privilege taxes are covered in Chapter 4 of Title 67, while sales and use taxes are covered in Chapter 6. Consistent with its placement in the chapter covering property taxes, Section 67-5-203(c) directs that the property shall be assessed to the user "at its value as determined pursuant to § 67-5-601", *i.e.*, at its property tax value, subject only to a deduction for restricted use. The tax remains on the property, albeit at a reduced value, not upon the beneficial use. Indeed, the statute specifies that it "shall not affect sales ~~and use~~ taxes imposed on users of federal property by § 67-6-209."

Thus, the statute at issue here, like that at issue in *United States* v. *Colorado, supra,* does not purport to be anything other than a tax on the property. Furthermore, it is clear that in this case Hawkins County is attempting to apply the statute to tax the federal government's property rather than Holston's beneficial use of that property. As the court of appeals explained (Pet. App. 6a), the assessor assessed the property to Holston according to ordinary procedures of the Tennessee code for "determin[ing] the classification and rate of assessment for real property." As

a result, "[t]he value he assigned to Holston in this instance was the same one he had previously assigned to the company when the county had unsuccessfully contended that Holston held a leasehold interest and attempted to impose the ad valorem real property tax." *Ibid.*

The court below did not, as petitioners suggest (Pet. 9, 10-11), hold that it is categorically impermissible to measure the value of beneficial use according to the value of the underlying property, subject to a deduction for restricted use. It merely held that the tax in question here was not imposed on, and limited to, Holston's beneficial use. The value of Holston's use of the plant obviously should not exceed its fixed management fee, which was $3.8 million in 1986. This is substantially less than the tax of $8,125,239 assessed against Holston for 1986. Since the tax itself therefore exceeds Holston's interest in the property, it is plain, as the court below concluded, that the tax is, in reality, a tax upon property of the United States.[2] In any event, such a factbound question concerning the application of settled legal principles to the specific tax imposed in this case does not warrant further review.[3]

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[2] The decision below is thus fully consistent with this Court's decisions in *United States* v. *City of Detroit*, 355 U.S. 466 (1958), and *United States* v. *Township of Muskegon*, 355 U.S. 484 (1958). In *City of Detroit* a federal contractor was the lessee of federal property and, thus, was held to have a taxable interest in the property. In *Muskegon*, the contractor was conducting a private commercial business selling goods to the United States and, while it did not have a formal lease, it essentially paid rent by reducing the price of the goods sold to the government to reflect the rental value of the property. Neither of these factors is present in the instant case.

[3] Because the courts below concluded that the tax in question was, in reality, a tax on the property of the United States, they did not reach the Government's additional arguments: (1) that the tax unconstitutionally discriminates against the United States, in that it does not similarly tax property owned by state and local governments or private

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WILLIAM C. BRYSON
Acting Solicitor General

MARCH 1989

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tax-exempt entities that is used or managed by contractors, and (2) that the Holston ammunition plant is exempt from the tax under Section 67-5-203(c) because it is used exclusively for a public purpose. The judgment below could be supported on either ground.

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STATE OF TENNESSEE, HAWKINS COUNTY, TENNESSEE, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' RESPONSE TO THE UNITED STATES' MEMORANDUM IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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PETITIONERS' RESPONSE TO THE UNITED STATES' MEMORANDUM IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

The petitioners, including the State of Tennessee and Hawkins County, Tennessee, respectfully submit the following response to the United States' memorandum in opposition to the petition for a writ of certiorari. The facts of this case are fully set forth in the petition filed with this Court on December 27, 1988. (Pet. 3-7).

The United States mistakenly characterizes the petitioners' request for a writ of certiorari as involving a "factbound question concerning the application of settled legal principles". (Memorandum 7). This petition in fact seeks review of a purely legal question, that being whether a State such as Tennessee may impose a tax on a private contractor's beneficial use of federal property and measure that tax by the value of the federal property, minus a deduction for any restricted use,

in an effort to equalize taxation of federal contractors with that of owners and other users of property in the State without violating the Supremacy Clause of the United States Constitution. This legal question regarding the method by which a State may value a private contractor's beneficial use of federal property is important not only to Tennessee but also numerous other states with similar statutes. (Pet. 12-14; Amicus Brief 2-11).

The decision of the Sixth Circuit invalidates the state use tax by labeling the statute an ad valorem tax on an interest in property. While the memorandum of the United States attempts to turn this into a "factbound" question of valuation, that quite simply is not the issue before this Court. The Sixth Circuit did not merely find Hawkin County's valuation of the beneficial use to be too high; instead it struck down the entire statutory mechanism for imposing the tax.

The petitioners submit that as long as a statutory mechanism exists to segregate a private contractor's beneficial interest in the federal property and limit the tax to that interest, then a tax levied under the statute passes constitutional muster.[1] *See e.g., United States v. County of Fresno,* 429 U.S. 452, 462-463, n.10 (1977); *Cummings v. Merchants' National Bank,* 101 U.S. 153,161 (1880); *Fell v. Armour,* 355 F. Supp. 1319, 1334 (M.D. Tenn.1972); *Kortz v. Ellingson,* 181 F.Supp. 857, 859 (D.Colo, 1960). Tenn. Code Ann. § 67-5-203(c) explicitly recognizes that the valuation of the beneficial use is subject to a deduction for any restricted use, and adequate and sufficient remedies exist for either the United States or Holston to contest the valuation of Holston's interest

[1]The United States in its opposing memorandum concedes that "to measure the value of beneficial use according to the value of the underlying property, subject to a deduction for restricted use" is valid. (Memorandum 7).

under Tenn. Code Ann. § 67-5-203(c). In fact, Holston has pursued these remedies by filing an appeal of Hawkins County's assessment to the Tennessee State Board of Equalization pursuant to Tenn. Code Ann. § 67-5-1501. (Pet. 6).

The United States' assertion on page 7 of its memorandum that the "value of Holston's [the cost-plus contractor] use of the plant obviously should not exceed it management fixed fee, which is 3.8 million dollars in 1986", not only fails to recognize the specific interest that is being taxed under Tennessee's statute, but also overlooks significant benefits that are conferred upon the private contractor in addition to its annual fee. Tenn. Code Ann. §67-5-203(c) levies a tax upon the private contractor Holston's beneficial use of federally owned real and personal property at the Holston Army Ammunition Plant. Holston utilizes literally hundreds of buildings located in the Holston Plant as well as federally owned equipment, all supplied rent free to it by the United States. (Pet. 3). The use of this property is essential to Holston's obtaining the significant benefits gained from its contract with the United States, and these benefits are not limited to the annual fee received by Holston. The fee represents only the guaranteed profit Holston gains from its activities at the Plant. Holston also receives reimbursement of virtually all costs incurred by it in meeting the requirements of its contract with the United States, which costs totaled $380,990,908.00 from the years of 1979-1985 or about $63,500,000.00 per year. Holston also occupies and utilizes the vast facilities located at the Plant cost-free in order to meet its production schedules for the United States, and indeed without the use of this property Holston could not comply with the terms of its contract.

The United States' circuitous argument that Tennessee's placement of this beneficial use tax in Chapter 5 of Title 67, which pertains to property taxes, necessarily causes Tenn. Code Ann. § 67-5-203(c) to be an unconstitutional tax on pro-

perty owned by the United States is totally without merit. Once again, the United States is relying upon "manipulation and wooden formalism" to improperly limit the full range of the State's taxing authority. *See United States v. New Mexico*, 455 U.S. 720, 735-737 (1982). Tenn. Code Ann. § 67-5-203(c) was placed among the property tax provisions of the Code because the use tax it imposes is designed to place federal contractors in the same economic posture as state and local goverments and charitable institutions which can be subjected to property taxes. That the statute compensates for a property tax does not show it taxes the property of the United States. As this Court has recognized, the mere fact that the legal incidence of the tax differs does not in and of itself constitute unlawful discrimination. *Washington v. United States*, 460 U.S. 536, 538-544 (1983).[2]

This Court has previously approved methods of taxing beneficial use that are similar to Tennessee's. Since the Sixth Circuit decision is incongruous with those precedents, review is appropriate here to clarify the mechanism under which use of federal property by a cost-plus contractor may be taxed by a state.

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[2]The Sixth Circuit did not reach the United States other attacks on Tenn. Code Ann. § 67-5-203(c), and the Petitioners disagree with the United States unsupported allegation in its memorandum that these arguments have any basis. (memorandum 7 n.3) The Petitioners are certainly willing to address these issues if this Court so wishes, but they are not presently before this Court.

CONCLUSION

For these reasons and the reasons set forth in the petition and in the amicus brief which several states have filed with this Court, the Petitioners submit that since the opinion of the Sixth Circuit conflicts with longstanding precedents of this Court and will substantially affect the taxing powers of the states, a writ of certiorari should issue to review the decisions below.

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